PARAMAHA ENTERPRISES SDN BHD & ORS A

v.

THE GOVERNMENT OF THE STATE OF SABAH & ANOR

HIGH COURT SABAH & SARAWAK, KOTA KINABALU B
STEPHEN CHUNG JC
[CIVIL CASE NO: K21-05-2005]
1 JULY 2011

CONTRACT: *Termination - Validity - Whether agreement validly terminated - Whether plaintiffs failed to perform contract as promised - Whether lands alienated to plaintiffs for development should be returned for total failure of consideration* C

By an agreement ('the agreement'), the first defendant ('the Government') engaged the first plaintiff ('Paramaha') to develop a huge D
tract of land ('the land') adjacent to the Kota Kinabalu International Airport into a tourist resort. The land was subdivided into 11 lots and alienated to the 2nd to the 12th plaintiffs, who were Paramaha's appointed nominees, to carry out the development in the respective lots pursuant to the agreement. Seven years later, the Government terminated E
the agreement on the ground that Paramaha had failed to commence construction works on the first phase of the development. Paramaha contended that the termination was unlawful as the Government had made amendments to the development plans, the approvals for which were pending from the relevant authorities, and that the Government F
was the cause of the delays. Paramaha sought a declaration that the termination was invalid and claimed damages for loss of profit and for the cost of work already done and for general and exemplary damages for breach of contract. The Government counterclaimed for a declaration that the termination was lawful as the plaintiffs were in breach of the agreement for failing to perform the same within the stipulated time. It G
also sought an order that the titles to the lands alienated to and registered in the plaintiffs' names be surrendered to it for cancellation.

Held (dismissing claim and allowing counterclaim with costs):

(1) The letter of termination was lawful and the termination was valid. H
After seven years, the first plaintiff was not ready to commence any of the development. Given the time constraints and the deadlines to complete the development and the land titles, it was obvious that the first plaintiff failed to do any of the things which it had promised. This was a fundamental breach which had deprived the I
first defendant of substantially the whole of the benefits under the agreement. (paras 29 & 33)

(2) As the agreement was lawfully rescinded because the first plaintiff had failed to perform its obligations in their entirety, there had been a total failure of consideration for the 11 lots of land alienated to and registered in the names of the second to the 12th plaintiffs as nominees or trustees of the first plaintiff. (para 34)

(3) Clause 4.2 of the agreement specifically provided that the first plaintiff undertook to the first defendant to procure the due performance by each nominee of its respective obligations and covenants in the particular title deed alienated in its name. As there had been a total failure of consideration on the part of the plaintiffs, the 11 lots of land should revert back to the first defendant. (para 34)

Case(s) referred to:

Amalgamated Investment & Property Co Ltd (In liquidation) v. Texas Commerce International Bank Ltd [1981] 1 All ER 923 ***(refd)***

Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd [2010] 1 CLJ 269 FC ***(refd)***

Joo Seng Trading Co v. Commercial Importers and Distributors Sdn Bhd [2007] 2 CLJ 25 CA ***(refd)***

LSSC Development Sdn Bhd v. Thomas Iruthayam & Anor [2007] 2 CLJ 434 CA ***(refd)***

Panchauld Freres SA v. Establishment General Grain Company [1970] 1 Lloyd's LR 53 ***(refd)***

Sim Chio Huat v. Wong Ted Fui [1983] 1 CLJ 178; [1983] CLJ (Rep) 363 FC ***(refd)***

Takako Sakao v. Ng Pek Yuen & Anor [2010] 1 CLJ 381 FC ***(refd)***

Legislation referred to:

Contracts Act 1950, ss. 40, 56(1)
Sabah Land Ordinance, s. 34

For the plaintiffs - Ansari Abdullah; M/s Ansari & Co
For the defendants - Mohd Hanafiah Mohd Kassim (Govinder Raj & Chris Thian Vun Khong with him); State AG's Chambers

Reported by Ashok Kumar

JUDGMENT

Stephen Chung JC:

[1] By an agreement dated 25 May 1996, entered into between the 1st plaintiff and the 1st defendant, through the permanent secretary, Ministry of Finance, the 1st defendant agreed to appoint the 1st plaintiff as the developer of a parcel of land containing an area of approximately 128.42 acres, which was adjacent to the Kota Kinabalu International Airport (KKIA) and the beach at Tanjung Aru, Kota Kinabalu, into an integrated tourist resort to be known as the Kota Kinabalu Beach

Resort. The development was to be subdivided into ten lots (lot 5 being divided into 5A and 5B making a total of 11 lots of land) and to be completed in phases. The 2nd to 12th plaintiffs were the appointed nominees of the 1st plaintiff and subsequently became the registered owners of each of these lots which were alienated to them for the development pursuant to the agreement.

[2] By a letter dated 28 May 2003, the 1st defendant terminated the agreement on the grounds that the 1st plaintiff had failed to commence construction work on lot 5A and phase one of the development. The 1st plaintiff contended that the termination was unlawful because the 1st defendant had made amendments to the development plans; the relevant state authorities had yet to approve the several plans necessary for the development to be carried out and the delays were caused by the 1st defendant. The plaintiffs sought a declaration that the termination of the agreement by the 1st defendant was invalid and void; payment of a sum of RM589,624,860 being loss of profit; or in the alternative, payment of a sum of RM40,000,000 being costs and expenses incurred by the plaintiffs for works done pursuant to the agreement and for general and exemplary damages to be assessed for breach of contract.

[3] The 1st defendant counterclaimed and sought a declaration that the plaintiffs were in breach of the agreement in failing to carry out and complete the development within the stipulated time without just cause; a declaration that the 1st defendant was entitled to terminate the agreement under cl. 15.2(a) thereof; that the plaintiffs held the parcels of land registered in the names of the 2nd to 12th plaintiffs as trustees under a resulting or constructive trust pending the fulfillment of all the obligations under the agreement and for an order that the plaintiffs surrender the land titles alienated to and registered in their names for the same to be cancelled thereto.

[4] In the statement of claim, the 1st plaintiff had also pleaded that the 1st defendant through the 2nd defendant had designed a plan to injure the plaintiffs by unlawful means which they described as "abuse of process" ie, by causing the 2nd defendant to issue show cause notices to the 2nd to 12th plaintiffs under s. 34 of the Sabah Land Ordinance, why the State Government of Sabah should not re-enter and resume the lands registered in the name of the 2nd to the 12th plaintiffs for breach of the conditions of the land titles.

[5] At the end of the trial, it was submitted that during the trial the plaintiffs had not adduced any evidence regarding the "abuse of process" and that the plaintiffs had therefore abandoned this cause of action against the 1st and 2nd defendants. In their written submissions, the plaintiffs admitted that they did not lead any evidence on the cause of

A action in relation to the "abuse of process" and conceded that the plaintiffs had abandoned their claims in respect of the said cause of action.

[6] The issue to be determined is whether the letter of termination dated 28 May 2003 was valid and lawful. From a reading of the agreement, the main terms were as follows:

(a) Clause 1.1 provided that the 1st plaintiff was to construct and complete the development on the lots together with the amenities, utilities and infrastructure in accordance with the land use or zoning specified in the conceptual plan annexed as Schedule 3 and subject to the terms and conditions of the agreement.

(b) According to cl. 2.1, Schedule 3 and Schedule 4, the development would include a five-star hotel on Lot 1, a three-star hotel on Lot 2, residential development on Lot 4 and government residential development on Lot 5A and Lot 5B.

(c) Under cl. 2.3, the 1st defendant's entitlement under the development consisted of (a) Lot 5A being 100 units of staff quarters and 114 units of division 2 quarters, (b) Lot 5B being 90 units of division 1 quarters, (c) Lot 4 certain units of dwelling units as ascertained in cl. 2.6, (d) a new multi-purpose hall, (e) a new Prince Philip Park, and (f) upgrading and alignment of the Tanjung Aru Beach.

(d) Under cl. 4, in consideration of the completion and delivery of the 1st defendant's entitlement under the development, the 1st plaintiff would be entitled to the rest of the development on the land and for these purposes, the 1st defendant would alienate the 11 lots to the 1st plaintiff and/or its nominees subject to the submission of an application for the 11 lots of land by the 1st plaintiff, subject to a final survey and subject to the 1st plaintiff providing a bank guarantee in a sum equivalent to the value of each title so alienated and ascertained at a rate of RM778,694.90 per acre and which valuation was set out in Schedule 5.

(e) Clause 5.1 provided that the 1st plaintiff would within six months from the date of the agreement carry out at its own costs and expenses, preliminary work required for the development being the survey work, soil investigation, preparation and submission of the development plan to the relevant authorities for approval.

(f) Clause 6.1(b) provided that the 1st plaintiff would develop the said lots and to complete the proposed development in accordance with the relevant plans approved by the relevant authorities, with the terms and conditions contained in the agreement and the terms and

conditions in the land titles. The development was to be completed on or before the expiry of eight years from the commencement date for the Lot 5A entitlement, with such extension as would be permitted in the agreement.

(g) Under cl. 3.1, the development was to be completed in phases in accordance with the schedule of implementation in Schedule four which *inter alia* provided that the multi-purpose hall and the Prince Philip Park were to be completed within one and a half years from the date of commencement, the government residential development in Lot 5A was to be completed within two years from the date of commencement, the development commencement date was to be not later than nine months from the date of the approval of all the relevant plans for the lot concerned provided the title deed for the lot concerned had been issued.

(h) Clause 24 provided that time whenever mentioned "shall be of the essence of this agreement.

[7] The 1st defendant's obligations were provided in cl. 7 of the agreement and they were *inter alia* (a) to alienate the lands to the 1st plaintiff in accordance to the Land Ordinance and land use/zoning plan: (b) to deliver vacant possession of the lands within four months from the date of the agreement; and (c) to use its best endeavour to assist the 1st plaintiff to obtain all approvals from the relevant authorities in respect of the relevant plans for the development.

[8] Section 40 of the Contracts Act 1950 provides that when a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence, in its continuance. Section 56(1) of the Act provides that when a party to a contract promises to do a certain thing at or before a specified time, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

[9] In this case, time was the essence of the contract, as the parties had agreed in the agreement that it be so: *Sim Chio Huat v. Wong Ted Fui* [1983] 1 CLJ 178; [1983] CLJ (Rep) 363 FC. The doctrine of repudiation of a contract is based on the proposition that where a promisor wrongfully repudiates a contract in its entirety, the promisee has a choice whether to elect to accept the repudiation, treat the contract as at an end and sue for damages or to reject the repudiation and treat the contract as subsisting: *LSSC Development Sdn Bhd v. Thomas Iruthayam & Anor* [2007] 2 CLJ 434 CA, *Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd* [2010] 1 CLJ 269 FC.

[10] Clause 15.1 of the agreement set out the events of default which would constitute a breach by the 1st plaintiff which entitled the 1st defendant to terminate the agreement. These included (a) if the developer failed to carry out the preliminary works as provided in cl. 5.1; (b) if the developer failed to submit the development plan for approval to the relevant authorities within the time stipulated; (c) if the developer did not commence construction work of each phase of the proposed development within the stipulated time; and (g) if the developer failed to keep the bank guarantee valid up to the date of completion or until earlier released as provided in the agreement. Clause 15.2 provided that the 1st defendant was entitled to terminate the agreement by giving three months' notice in writing to the developer without prejudice to its rights of action against the developer and the bank guarantee given under cl. 4.5.

[11] The letter of termination was issued pursuant to cl. 15.1 and 15.2 of the agreement. In the letter, the 1st defendant stated that although the building plans for Lot 5A was approved on 17 July 2002, the 1st plaintiff had failed to commence construction works for Lot 5A within nine months thereto; that the 1st plaintiff had failed to start construction works in respect of phase 1 simultaneously with Lot 5A; and that the 1st plaintiff had failed to give the irrevocable bank guarantee before the start of the construction works. The letter gave the requisite three months' notice to terminate the agreement.

[12] In addition to these grounds for the termination, the 1st defendant in para. 4.9A of its amended defence had also pleaded that the 1st plaintiff had failed or refused to carry out the survey work and soil investigation for the development within six months from 25 May 1996 in breach of cl. 5.1 of the agreement which entitled the 1st defendant to terminate the Agreement. The 1st Defendant also contended that notwithstanding the grounds set out in the letter, it was entitled to terminate the agreement by reason of the breaches pleaded in para. 19 and the particulars thereto in its amended defence: *Joo Seng Trading Co v. Commercial Importers and Distributors Sdn Bhd* [2007] 2 CLJ 25 CA.

[13] The 1st plaintiff disputed the 1st defendant's entitlement to terminate the agreement on the above grounds. The 1st plaintiff contended that it could not commence construction works because the relevant plans had not been approved; that the nine months had not expired; there was no provision in the agreement for the 1st plaintiff to give the guarantee; and the delays were caused by the 1st defendant in issuing the letters of offer to alienate the lands and the titles to the lands, delays in giving possession of the lands and delays in approving and returning the relevant plans so that they could be submitted to the relevant authorities. It was also contended that the 1st defendant had by its conduct led the 1st plaintiff to believe that it would not rely on the

grounds pleaded in its amended defence and therefore it could not rely on those grounds to terminate the agreement: *Panchauld Freres SA v. Establishment General Grain Company* [1970] 1 Lloyd's LR 53, *Amalgamated Investment & Property Co Ltd (In liquidation) v. Texas Commerce International Bank Ltd* [1981] 1 All ER 923.

[14] The evidence showed that the 1st plaintiff did comply with cl. 5.1 of the agreement which required the 1st plaintiff to carry out the preliminary works being the topographical and detail survey work and soil investigation within six months from the date of the agreement. The plaintiff had exhibited the reports for the survey and soil investigation which were dated 11 October 1996 and 18 June 1996 respectively. In the minutes of meeting on 25 September 2002, the 1st plaintiff confirmed that these works had been carried out.

[15] From the documentary exhibits, the 1st plaintiff submitted the master development plan to Dewan Bandaraya Kota Kinabalu (DBKK) for approval on 3 February 1997. It submitted the development plan for Lot 5 to DBKK on 11 September 1997 and the revised development plan on 14 September 1998. It submitted the building plans for Lot 5 to the Ministry of Finance (MOF) on 20 May 1999. It was contended that the 1st plaintiff could not commence works within the nine months required by cl. 9 (a) in particular on Lot 5A and Lot 5B because all the relevant plans were not approved. It was also contended that it was the 1st defendant who delayed the commencement of the construction works because it delayed in the delivery of the letters of offer in respect of the 11 lots of land which in turn delayed the submission of the master development plan by the 1st plaintiff.

[16] The parties had referred to the "guidelines for the submissions of development plans" issued by DBKK. The guidelines provided the steps or procedures to be followed when submitting a development plan for approval. Firstly, there must have been a land title issued, boundary and topography surveys must be done, followed by the submission of the development plan. Upon approval of the development plan, the building plan could then be submitted. Upon its approval, the structural plan could be submitted. Upon its approval, the developer could commence works.

[17] Clause 4.1 of the agreement provided that the 1st plaintiff would apply for the lands to be alienated and cl. 4.2 provided that within three months of the date of the agreement or within three months of receipt of the land applications, whichever was later, the 1st defendant would cause the issuance of the letters of offer to alienate the lands to the 1st plaintiff and/or its nominees. The 1st plaintiff had submitted its application for the lands to be alienated on 8 July 1996. The 1st defendant had issued the letters of offer for the several lots of lands

between 8 August 1997 and 9 January 1998, outside the three month time frame provided for in cl. 4.2. There was no time frame stipulated in the agreement for the issue of the land titles. There were some delays in the issue of the land titles because it took some time to carry out and complete the land survey for that purpose. The land titles were only issued in 2000. These did not prevent the 1st plaintiff from submitting the master development plan which it did on 3 February 1997 to DBKK, before the 1st defendant issued the letters of offer for the lands. The 1st defendant had written a letter dated 3 February 1997 to DBKK to assist with regards to the submission of the master development plan.

[18] The evidence showed that DBKK approved the development plan for Lot 5 on 6 November 1998 and the building plan for Lot 5 on 17 July 2002. The master development plan was approved on 20 June 2000. Under the agreement, the 1st plaintiff was to give priority to the development and completion of the Prince Philip Park, the Multi-purpose Hall, the Beachfront and Lot 5A which were part of the 1st defendant's entitlements under the development. Under the agreement, they were to be completed within one and a half years and two years respectively from the commencement date of Lot 5A of the development. The complaints of the 1st defendant was that notwithstanding the approvals of the above plans, the 1st plaintiff failed to commence works by the first quarter of 2003. It was also the complaint of the 1st defendant that the whole development was to be completed within eight years from the date of the agreement ie, on or before 25 May 2004 and that it would be impossible for the 1st plaintiff to do so with the limited time left for the development ie, between 28 May 2003 to 25 May 2004. These were part of the reasons which led the 1st defendant to issue the termination letter.

[19] Reading cl. 6.1(b), the eight years within which the whole development must be completed did not commence from the date of the agreement. It only began to run from the commencement date for Lot 5A which was for the construction of the government residential apartments. In any event, the whole development must be completed before January 2005 as stipulated in the documents of title for the lands.

[20] When should the 1st plaintiff commence work on the development? The parties had referred to cl. 9 on the commencement date and to cl. 10 on the computation of time. It was the 1st plaintiff's contention that it was not required to commence work and that it could not do so at that point in time because all the relevant plans had not been approved as provided for in cl. 9(a) of the agreement. It was submitted that under cl. 10, any period of delay brought about by any

amendment to the plans required by the relevant authorities would be excluded from the computation of time and therefore the nine months specified in cl. 9(a) had not expired when the 1st defendant issued the termination letter.

[21] Clause 9(a) provided that "The Developer shall commence construction works not later than nine months from the date of the approval of all relevant plans for the lot concerned provided the title deed(s) for the said lot concerned has been issued." The title deeds for the lots had been issued in 2000 and any delay relating thereto should no longer be of contention. As stated above, the 1st plaintiff was able to submit the master development plan to DBKK although the land titles had not been issued. Had all the relevant plans been approved?

[22] The "relevant plans" were defined in cl. 6.1(a) of the agreement to include the master development plan, the building plan and all other relevant plans required for the Hall, the Park, the Beach Front and Phase one of the development. There was no definition of "all other relevant plans" in the agreement. Did they include any survey plan, earthworks plan and structural plans? The agreement was silent on these. Schedule four part II of the agreement listed 12 projects which were included in phase 1 of the development and they included commercial shop-offices, 3-star hotel, beach front, infrastructure and car park. The last three projects did not include any building to be constructed and would not require any building plans to be approved for works to be commenced notwithstanding the definition in cl. 6.1(a) of the agreement.

[23] Therefore the definition of all other relevant plans by necessity would have to be flexible depending on the project or development concerned. If a building plan was not required for the development, then it would not be included in the definition of all other relevant plans for that development. Further, although the definition of the "Relevant Plans" only referred to phase 1 of the development, they should by necessity include phase 2 and phase 3 of the development because the 4th Schedule provided for the development to be in three phases.

[24] Although the agreement did not provide the time-frame for the approval of the relevant plans to be obtained, it did provide the time when these plans must be applied for. Clause 6.1(a) provided that the 1st plaintiff must submit the master development plan within six months from the date of the agreement. It went on to provide that within six months of the approval of the master development plan, the 1st plaintiff must apply for the approval of all other relevant plans. As stated above, the master development plan was approved on 20 June 2000. In accordance with cl. 6.1(a), the 1st plaintiff was required to apply for all other relevant plans within six months of that date.

[25] The 1st plaintiff only submitted the revised building plan for Lot 5 on 6 August 2001, outside the six month requirement. The 1st plaintiff put the blame on the 1st defendant for not returning the building plan so that they could be submitted to the relevant authorities. Assuming that it was true, the building plan was approved on 17 July 2002. The evidence showed that the 1st plaintiff only sent the structural plan and earthworks plan for Lot 5 to the 1st defendant for signing on 16 January 2003 and submitted the same to DBKK on 18 March 2003. The 1st plaintiff did not submit many plans for the Park, the Hall and the Beachfront.

[26] Further, under the agreement, the 1st plaintiff was required under cl. 4.5 to give a bank guarantee to be computed in accordance with cl. 11.1 when the 1st plaintiff intended to charge or to commence development of any of the lots of land. The bank guarantee was RM100 million for the 128.4 acres and would be reduced upon progressive completion of works of the Park, the Hall and the Beachfront. The 1st defendant complained that the 1st plaintiff had failed to provide the bank guarantee.

[27] The evidence showed that the development was beset with problems from the beginning. For a development of its size and the lands being situated adjacent to KKIA and to the foreshores, there were zoning restrictions to be complied with, for example certain portions of the lands had previously been gazetted for certain uses only and must be de-gazetted and re-zoned before planning approval could be given by DBKK and the Central Planning Board. These issues were not dealt with prior to the submission of the master development plan. These resulted in the plan to be revised and amended which delayed its approval. Secondly, it would appear that the 1st plaintiff in submitting the master development was not aware that it should carry out the earthworks in accordance to the Earthworks By-Law 1987. Thirdly, in preparing and submitting the relevant plans, the 1st plaintiff had to deal with several Federal and State departments or agencies and the red tapes which went with these, which also added to the delays. It was apparent that the agreement was too ambitious and did not foresee and provide for these planning and teething problems when it provided for the time frames for the different phases of the development to be completed. It was either through inexperience and/or bad planning. To make matters worse, the development was affected by the Asian Financial Crisis.

[28] Under the agreement, the 1st plaintiff promised to develop and complete in phase 1 of the development the Prince Philip Park, the Multi-purpose Hall and the Beachfront within one and a half years and Lot 5A within two years from its commencement date. Looking at schedule 4 part I, these were scheduled to be completed within three years from the date of the signing of the agreement, including the

submissions and approvals of all the relevant plans and the nine month period provided for in cl. 9(a) of the agreement. The preparations and submissions of the relevant plans for approvals were merely preliminary and incidental works before the promised development could be implemented in accordance to the stipulated times. As stated above, these time-frames were obviously too ambitious but the parties must be held to their bargains which they had freely negotiated and agreed to in the agreement, this being a commercial contract between them.

[29] The evidence showed that on 18 March 2003, the 1st plaintiff only submitted the structural plan and earthworks plan for Lot 5A. It would take time for these two plans to be approved before the 1st plaintiff could commence work on Lot 5A. At that point in time it had not commenced work on the Park, the Hall and the Beachfront. The failure to provide the bank guarantee was also an indication that the 1st plaintiff was not ready to commence development of any of the lots of land. After seven years, the 1st plaintiff was not ready to commence any of the development. Given the time constraints and the datelines to complete the development as provided under the agreement and the land titles, it was obvious that the 1st plaintiff had failed to do any of the things it had promised. This was a fundamental breach which had deprived the 1st defendant of substantially the whole benefits under the agreement, bearing in mind that the 11 lots of prime land in Kota Kinabalu had been alienated and registered in the names of the 2nd to 12th plaintiffs.

[30] Did the 1st defendant waive its right of rescission and acquiesced in the delay? Since the agreement was signed, the development had been affected by delays. From 1996 until when the land titles were issued in 2000, the complaints primarily were that the 1st defendant was at fault and had delayed in issuing the land titles which delayed the submissions and approvals of the development plans. As stated above, the problem with the land titles was no longer an issue after they were issued. From 2000 onwards, the complaints were on the delays by the 1st plaintiff in the submissions and approvals of the relevant plans and that the 1st plaintiff was at fault and failed to commence work on the development. The evidence showed that the 1st plaintiff was required to explain the delays at a meeting held on 25 September 2002 and it advised that it would start work in December 2002.

[31] Clause 18(a) of the agreement provided that no failure or delay on the part of any party in exercising any power or right would operate as a waiver nor would any single or partial exercise of such right or power preclude any other further exercise of any other right or power under the agreement. Clause 31 of the agreement provided that no variation amendment modification or waiver of any provision of the

A agreement would in any event be of force or effect unless the same was confirmed in writing by the relevant parties. Reading these two clauses together, for a waiver to be effective the same must be in writing or confirmed in writing. From the evidence before the court, the 1st defendant did not waive the obligations of the 1st Plaintiff in particular
B under cls. 4.5, 6.1(a), 6.1(b) and 6.1(j) of the agreement in writing.

[32] In the agreement, it must be noted that cl. 15 provided for 'event of breach' by the 1st plaintiff as the developer but the agreement did not include a similar provision for 'events of breach' by the 1st defendant. Bearing in mind that the 1st defendant's primary obligation
C was to alienate the lands on which the development was to be carried out and the lands having been alienated to the 1st plaintiff or its nominees, cl. 27 specifically provided that the agreement 'shall be discharged by performance and performance alone'. The evidence showed that the 1st plaintiff had failed to perform its promise in its
D entirety.

[33] For the reasons given, the letter of termination was lawful and the termination was valid. The right to terminate puts an end to the contract only as to the future rights and obligations. All past rights and duties under the contract remain unaffected: *Berjaya Times Square Sdn Bhd v.*
E *M-Concept Sdn Bhd (supra)*. Clause 15.2(c) of the agreement provided that any work done to the date of termination by the 1st plaintiff would be forfeited and the 1st plaintiff was not entitled to claim for any work done on a *quantum meruit* basis from the 1st defendant.

F **[34]** As the agreement was lawfully rescinded because the 1st plaintiff had failed to perform its obligations in their entirety, there had been a total failure of consideration for the 11 lots of land which had been alienated and registered in the names of the 2nd to the 12th plaintiffs as the nominees or trustees of the 1st plaintiff under the terms of the
G agreement. Clause 4.2 specifically provided that the 1st plaintiff undertook to the 1st defendant to procure the due performance by each nominee of its respective obligations and convenants in the particular title deed alienated in its name. As there had been a total failure of consideration on the part of the 1st to the 12th plaintiffs under the
H agreement, the 11 lots of land should revert to the 1st defendant: see also *Takako Sakao v. Ng Pek Yuen & Anor* [2010] 1 CLJ 381 FC.

[35] I dismiss the plaintiffs' claims and allow the 1st defendant's counterclaim in terms of prayers (a), (b), (c), (d) and (e) of the reliefs thereto. Costs to the defendants to be taxed.

I